

SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC05-1563

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: FLORIDA MARRIAGE PROTECTION AMENDMENT

**ANSWER BRIEF OF INTERESTED PARTIES RICHARD NOLAN and
ROBERT PINGPANK, ROBERT SULLIVAN and JON DURRE, DEE
GRAHAM and SIGNA QUANDT, RICHARD ROGERS and BILL
MULLINS, TERESA ARDINES and MELISSA BRUCK, JUAN TALAVERA
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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Summary of Argument	1
Argument.....	3
I. The Proposed Amendment Violates The Single-Subject Rule	3
II. The Ballot Title And Summary Are Not Written In “Clear And Unambiguous Language	9
A. “Substantial Equivalent of marriage.”	9
B. “Marriage protection.”	16
Conclusion	18
Certificate of Service	21
Certification of Type Style and Font Size	21

Table of Authorities

Cases

Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646 (Fla. 2004)16

Advisory Op. to the Att'y Gen. re Amendment to Bar Government From Treating People Differently Based on Race in Public Education, 778 So. 2d 888 (2001) ...7

Advisory Op. to the Att'y Gen. Re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Purpose, 880 So.2d 630 (Fla. 2004)7

Advisory Op. to Att'y Gen. re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d 1304 (Fla. 1997)7

Advisory Op. to the Att'y Gen. re Public Protection from Repeated Medical Malpractice, 880 So. 2d 667 (Fla. 2004)16, 17

Advisory Op. to Att'y Gen.- Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994)7

Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998)7

Advisory Op. to Att'y Gen.- Save Our Everglades, 636 So. 2d 1336 (Fla. 1994).....7

Advisory Op. to Att'y Gen. re Tax Limitation, 644 So. 2d 486 (Fla. 1994).....7

Albano v. Attorney General, 769 N.E.2d 1242 (Mass. 2002).....8

Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981)5

Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984).....8, 17

<i>Fine v. Firestone</i> , 448 So. 2d 984 (Fla. 1984)	6, 7, 8
<i>Forum for Equality PAC v. McKeithen</i> , 893 So. 2d 715 (La. 2005)	7, 9
<i>Franklin v. State</i> , 887 So.2d 1063 (Fla. 2004).....	5, 8, 9
<i>Knight v. Superior Court</i> , 128 Cal. App. 4th 14, 26 Cal. Rptr. 3d 687 (Ct. App. 3rd Dist. 2005)	4
<i>Louisiana Public Facilities Authority v. Foster</i> , 795 So.2d 288 (La. 2001)	8
<i>Opinion of the Justices to the Att'y Gen.</i> , 664 N.E.2d 792 (Mass. 1996)	9
<i>Smith v. Department of Insurance</i> , 507 So.2d 1080 (Fla. 1987)	5
<i>Wood v. Commonwealth of Kentucky</i> , 2004 WL 1258921 (Ky. Cir. Ct. 2005)	8

Statutes

1997 Haw. Sess. Laws c. 383	10
2003 Me. Laws c. 672.....	10
2003 N.J. Laws c. 246.....	11
Cal. Fam. Code § 308.5	4
Fla. Const. Art. III § 6.....	1, 5, 8
Fla. Const. Art. XI § 3	1, 6, 8
Fla. Stat. §§ 741.28	15
Fla. Stat. § 101.161	1
Ky. Const. § 256	8
La. Const. Art. XIII.....	7

Mich. Const., Art., 1 § 25	11
Ohio Const. Art. XV, § 11	14
Utah Const., Art., 1 § 29	12

SUMMARY OF ARGUMENT

The proponents of the proposed amendment (the “Proponents”) acknowledge that it would encompass two subjects—marriage for same-sex couples and alternative comprehensive protections for lesbian and gay couples such as civil unions. They attempt to rescue it from the clear single-subject violation by arguing that it nonetheless “carries forth the unified objective” of preserving marriage as a heterosexual institution. But that is not the standard under Art. XI, § 3 of the Florida Constitution. Moreover, the polling data shows that the public sees marriage and alternative comprehensive protections such as civil unions as two separate subjects about which they hold sharply different opinions. In an effort to get around the single-subject problem, the Proponents turn to the separate single-subject rule applicable to statutes (Art. III, § 6 of the Florida Constitution) and cases from other jurisdictions. But this reliance is misplaced because the Florida Constitution imposes a far less stringent single-subject rule on legislation than on citizen initiated amendments, and none of the jurisdictions whose cases were cited by the Proponents has a single-subject rule like Florida’s.

In addition, the ballot summary violates the fair notice requirement of Fla. Stats. § 101.161 by using the vague term “substantial equivalent” of marriage and

the political rhetoric of “marriage protection” to obscure the impact of the proposed amendment beyond marriage.

The term “substantial equivalent” of marriage does not inform voters which types of protections for same-sex couples apart from marriage are barred by the proposed amendment. The Proponents say that this term is clear and means that only comprehensive protections (such as the civil union and domestic partnership laws in Vermont, Connecticut and California) are affected, while anything less than “the full panoply of rights” of marriage, such as existing domestic partnership protections in Florida, is not. But experiences in other jurisdictions show that there is widespread confusion and disagreement about what this kind of language means. And many government officials and others disagree with the Proponents and have taken the position that similarly worded amendments prohibit local domestic partner registries and even domestic partner health benefits for government employees.

The ballot summary improperly interjects the political rhetoric of “marriage protection” in lieu of the neutral language of the amendment text. Contrary to the Proponents’ suggestion, the fact that the word “protect” was found to be neutral in other contexts does not mean it is inherently neutral regardless of the context. Whether words are emotional and political and, thus, misleading, cannot be

determined in a vacuum. When evaluating ballot summaries, the Court takes into account the significance of the language in the particular context. Here, because the text of the proposed amendment does not explain how it would protect marriage, and because “marriage protection” is rhetoric used in the political debate around this emotional issue, this language is misleading.

ARGUMENT

I. The Proposed Amendment Violates The Single-Subject Rule

The Proponents admit that the proposed amendment is specifically intended to ban not only marriage for lesbian and gay couples but also laws that would provide same-sex couples with all or most of the protections that marriage affords (but not the same status), such as the civil union and domestic partnership laws in effect in Vermont, Connecticut and California. Initial Brief of Florida4Marriage.Org (“Proponents’ Brief”), at 8, 15-16, 23.

They attempt to defend the inclusion of these two subjects in one proposed amendment by saying that the bar against marriage for same-sex couples and the bar against alternative comprehensive forms of protections for these couples (what they call “marriage equivalents”) “carr[y] forth the unified objective of preserving marriage as the legal union of one man and one woman. . . .” Proponents’ Brief, at

13-14, 15. But the applicable legal standard is whether a proposed amendment embraces more than one subject, not whether it “carries forth a unified objective.” In any case, there is simply no logical connection between the second subject of the proposal—barring the creation of protections such as civil unions for same-sex couples—and the objective of “preserving marriage” as a heterosexual institution. And the polling data demonstrates that the public sees no such connection. Voters see marriage and comprehensive alternative forms of protections for same-sex couples as very different things. *See* initial brief of Interested Parties, at 15-19.¹ While a majority of the population does not favor the right to marry for same-sex couples, a majority does support civil unions and other forms of legal recognition for committed lesbian and gay couples. *See Id.* In the minds of voters—whom the single-subject rule was created to protect—marriage and civil unions for same-sex couples are not one subject but two. The proposed amendment is therefore a classic attempt at logrolling. If the Proponents want to ask voters to approve both

¹ So did a court that addressed this precise question. In *Knight v. Superior Court*, 128 Cal. App. 4th 14, 26 Cal. Rptr. 3d 687 (Ct. App. 3rd Dist. 2005), the California Court of Appeal rejected the argument that California’s comprehensive domestic partnership law violated a citizen initiative limiting marriage to different-sex couples (Cal. Fam. Code § 308.5), because, the court held, domestic partnership is not marriage.

ideas, they are free to do so, but they have to do it in two separate proposed amendments, not one.

The Proponents try to get around this problem, first, by arguing that the proposed amendment complies with the single-subject rule because Florida’s Defense of Marriage Act (“DOMA”), which has similar language, does not violate the separate single-subject requirement for statutes. But as they recognize, legislation is subject to a far less stringent single-subject standard than the rule applied to constitutional amendments passed by citizen initiative. The standard for legislation is Art. III, § 6 of the Florida Constitution, which provides that “[e]very law shall embrace but one subject and matter properly connected therewith” This Court has interpreted this provision liberally (*see, e.g., Franklin v. State*, 887 So.2d 1063, 1073 (Fla., 2004)), upholding laws that contain multiple subjects.² “The use of the phrase ‘properly connected’ in article III, section 6 is broader than the phrase ‘directly connected’ required by article XI, section 3 of the Florida

² *See, e.g., Chenoweth v. Kemp*, 396 So.2d 1122 (Fla.1981) (upholding law that contained provisions covering medical malpractice, tort litigation, and insurance reform); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla.1987) (upholding law that covered insurance reform, tort reform, and modification of financial responsibility requirements applicable to physicians).

Constitution, which authorizes changes in our constitution by citizen initiative petition.” *Id.*

In *Fine v. Firestone*, 448 So. 2d 985 (Fla. 1984), the Court explained the distinctions between the two rules:

First, we find that the language “shall embrace but one subject and matter *properly connected* therewith” in article III, section 6, regarding statutory change by the legislature is broader than the language “shall embrace but one subject and matter *directly connected* therewith,” in article XI, section 3, regarding constitutional change by initiative. Second, we find that we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative. Third, and most important, we find that we should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.

Id. at 988-89 (emphasis in original). Therefore, whether the statutory DOMA satisfies Art. III, § 6 says nothing about whether the proposed amendment satisfies the more exacting requirements of Art. XI, § 3.

The Proponents also suggest that the Court should look to decisions of courts in other states that have addressed the validity of similar constitutional amendments. But none of those courts applied Florida’s single-subject rule. Art. XI, § 3 of the Florida Constitution provides that a proposed amendment “shall

embrace but one subject and matter directly connected therewith,” and this Court has insisted on “strict compliance” with this rule (*Fine*, 448 So. 2d at 988-89), striking down numerous proposed amendments that failed to satisfy it.³ In contrast, the constitutions of Louisiana, Massachusetts and Kentucky all allow multiple subjects in an amendment, requiring only that they relate to (or are “germane” to) the same general subject or plan, and the courts of those states have construed these requirements liberally.

The Louisiana Constitution provides that a proposed amendment shall “be confined to one *object*.” La. Const. Art. XIII, § 1(B) (emphasis added). The Louisiana Supreme Court has adopted a “broad construction” of that rule through a “germaneness” test. *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715, 732

³ See, e.g., *Advisory Op. to the Att’y Gen. Re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Purpose*, 880 So.2d 630 (Fla. 2004); *Advisory Op. to the Att’y Gen. re Amendment to Bar Government From Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2001); *Advisory Op. to Att’y Gen re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565 (Fla. 1998); *Advisory Op. to the Att’y Gen. Re People’s Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304 (Fla. 1997); *In re Advisory Op. to Att’y Gen.- Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994); *Advisory Op. to the Att’y Gen.- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994); *Advisory Op. to the Att’y Gen. Re Tax Limitation*, 644 So. 2d 486, 491 (Fla. 1994); *Evans v.*

(La. 2005). An amendment with multiple provisions satisfies the rule if every provision in it is germane to a single plan, and “germane” means “that which is in close relationship, appropriate, relevant, or pertinent to the general subject.” *Id.*, quoting *Louisiana Public Facilities Authority v. Foster*, 795 So.2d 288, 299 (La. 2001). Massachusetts’ requirement that subjects in an amendment be “related” is also a germaneness test. See *Albano v. Attorney General*, 769 N.E.2d 1242, 1247 (Mass. 2002) (“[a]n initiative petition can address more than one subject if those subjects are related,” and subjects are related if they are germane to a common purpose). The germaneness test is nothing like the “directly connected” requirement in Art. XI, § 3. Indeed, this Court has characterized the more liberal single-subject rule applicable to legislation (Fla. Const. Art. III, § 6) as a germaneness test. *Franklin*, 887 So.2d at 1077-78.

Similarly, the Kentucky Constitution requires only that subject matters be “related.” Ky. Const. § 256. As the court noted in *Wood v. Commonwealth of Kentucky*, 2004 WL 1258921 (Ky. Cir. Ct. 2005), this rule and the case law interpreting it “create a liberalized construction concluding that multiple subject matters in an amendment are permissible if congruous or related to a generalized

Firestone, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).

plan.” *Id.*, at *6. Like the Louisiana and Massachusetts provisions, this mirrors the more liberal single-subject rule that the Florida Constitution imposes on legislation. *See Franklin*, 887 So.2d at 1077-78.⁴

Cases from these states therefore say nothing about whether the proposed Florida Marriage Protection Amendment satisfies the Florida Constitution’s single-subject requirement.

II. The Ballot Title And Summary Are Not Written In “Clear And Unambiguous Language”

A. “Substantial equivalent” of marriage.

The “substantial equivalent” of marriage is not merely imprecise language that might require some refinement as the Proponents suggest. This is a subjective phrase with no clear meaning, especially given the range of protections afforded to committed same-sex couples that have been implemented or are under

⁴ Indeed, a Westlaw search of caselaw in Louisiana, Massachusetts and Kentucky found only one case in which a constitutional amendment was invalidated because it addressed unrelated subjects. *Opinion of the Justices to the Att’y Gen.*, 664 N.E.2d 792 (Mass. 1996). There is one Louisiana case from 1941 in which an amendment was invalidated based on an earlier stricter version of the single-object rule, but the Louisiana Supreme Court subsequently shifted to a broader rule. *See McKeithen*, 893 So. 2d at 729-32.

consideration in jurisdictions across the country. When does government protection for same-sex relationships reach the level of the “substantial equivalent” of marriage? Only when all or virtually all the rights and obligations of marriage are provided? What about laws that provide for 90% of the rights and obligations of marriage? What about 75%? 50%? 25% of those rights and obligations? Dictionary definitions of the terms “substantially” and “equivalent” do not provide an answer to this question.

The Proponents state their view that anything less than “the full panoply of rights, protections, benefits, responsibilities, obligations and duties of marriage” should not be affected by the proposed amendment. Proponents’ Brief, at 16. They believe that comprehensive protections like Vermont and Connecticut’s civil union laws and California’s domestic partnership law would be prohibited by the proposed amendment, but that the limited domestic partnership protections in effect in various municipalities in Florida would not be affected. *Id.*, at 19-20. However, they do not comment on the harder cases of policies that fall somewhere in between such as New Jersey and Maine’s domestic partnership laws and

Hawaii's reciprocal beneficiaries law,⁵ all of which provide significant and important protections for same-sex couples but nothing approaching the "panoply of rights" of marriage.⁶

Moreover, the issue is not what the Proponents believe the amendment means, but whether the language is clear and unambiguous to the voters. Experiences in other jurisdictions have demonstrated tremendous confusion and disagreement over the meaning of similar language, specifically with respect to its effect on governments' provision of limited domestic partner benefits. As discussed in the initial brief of Interested Parties, in Michigan, the governor and attorney general disagree about whether that state's analogous amendment⁷ bars the provision of domestic partner benefits to government employees and this

⁵ 2003 N.J. Laws c. 246; 2003 Me. Laws c. 672; 1997 Haw. Sess. Laws c. 383.

⁶ For example, New Jersey's domestic partnership law provides registered domestic partners the right to visit one another in the hospital, the right to make medical decisions for an incapacitated partner, an additional tax exemption from personal income tax, transfer inheritance tax on the same basis as spouses, and, for state employees and retirees, public pension and health benefits for domestic partners. 2003 N.J. Laws c. 246.

⁷ Mich. Const., Art., 1 § 25 ("the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.").

question is currently before a court. *See* initial brief of Interested Parties, at 27-28.⁸ Just last month, the government agency in Utah responsible for implementing government employment benefits resorted to going to court to find out whether that state's similar amendment⁹ allows for Salt Lake City's new domestic partner health benefits policy.¹⁰ "[I]t is unclear," the agency wrote in its brief, "whether the Executive Order granting benefits to domestic partners is a law creating a legal status substantially equivalent to marriage." *Id.*, at 7; *see also id.*, 10-11.

⁸ On September 27, 2005, a Michigan trial court ruled that the amendment does not prohibit the provision of domestic partner employment benefits to government employees. (Copy of court's order attached as Exhibit 1). The attorney general announced his intention to appeal. *See* Jameel Naqvi, Same-sex Benefits Decision Appealed; "U" Says it will File Amicus Brief with Appellate Court to Support Benefits, Michigan Daily News, October 3, 2005, available at <http://www.michigandaily.com/vnews/display.v/ART/2005/10/03/4340c640d47ee> (copy attached as Exhibit 2).

⁹ Utah Const., Art., 1 § 29 ("Marriage consists only of the legal union between a man and a woman" and "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.").

¹⁰ *See* Petition for Trustee Instruction/Declaratory Judgment, In the Matter of the Utah State Retirement Board's Trustee Duties and Salt Lake City Executive Order Dated September 21, 2005, Third Judicial District Court in and for Salt Lake County (Case No. 050916879) (copy attached as Exhibit 3).

While the Proponents suggest that it is clear that existing domestic partnership protections in Florida are not at risk if the amendment passes because they are not the “substantial equivalent” of marriage, Liberty Counsel, an advocacy organization also serving as Proponents’ counsel here, has previously taken precisely the opposite position.¹¹ And it is not alone. Government officials in

¹¹ In *Martin v. City of Gainesville*, Fla. 8th Cir. Ct. 2000 (No. 01-00-CA-1814), the Liberty Counsel filed a brief challenging the City of Gainesville’s provision of health insurance benefits to the domestic partners of city employees. It argued that recognizing the relationships of employees and their domestic partners for this purpose “established a relationship that is the equivalent of marriage.” Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment, *Martin v. City of Gainesville*, Fla. 8th Cir. Ct. 2000 (No. 01-00-CA-1814), at 5 (copy attached as Exhibit 4). Indeed, while the Liberty Counsel now says that the proposed amendment does not affect existing domestic partner protections because it only affects policies that provide “the same panoply of rights” as and thus, “mimic” marriage, in *Martin* it said that Gainesville’s policy of merely providing domestic partner health benefits to employees “mimics marriage” and thus, conflicts with Florida law prohibiting recognition of same-sex marriage. *Id.*, at 11, 16, 20-21. It went on to characterize Gainesville’s domestic partner benefits policy the same way it characterizes the Vermont, Connecticut and California civil union and domestic partnership laws here: “‘If it looks like a duck, walks like a duck, and quacks like a duck, it’s a duck.’ The City’s Domestic Partner Relationship looks, acts, and operates like a marriage” *Id.*, at 15l; see Proponents’ Brief, at 21.

Proponents of the Michigan amendment also changed their position on this question, stating during the campaign that the amendment would not endanger existing domestic partner benefits from government employers, and then after the election, arguing that it did precisely that. See, e.g., Sharon Emery, [Proposal 2: Preserving the Traditional Family or Threatening the New](#), Mlive.com, October 24, 2004, and Stacey Range, [Proposal 2 Supporters Taking Aim at Same-Sex Benefits](#),

other states have said that analogous constitutional amendments prohibit government entities from providing domestic partner benefits to employees and bar local domestic partner registries. Michigan's attorney general issued a legal opinion stating that the City of Kalamazoo's policy of providing health and retirement benefits to the same-sex domestic partners of city employees violates the Michigan amendment because it gives domestic partners a "marriage-like status." *See* Opinion no. 7171 of Michigan Attorney General Mike Cox, March 16, 2005, available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10247.htm> (copy attached as Exhibit 6). It was reported that an Ohio state senator sought to stop state universities in that state from providing benefits to the domestic partners of their employees, arguing that such benefits are prohibited by Ohio's amendment,¹² and that a Utah state representative took the position that that state's

Lansing State Journal, November 4, 2004, available at <http://www.lsj.com/apps/pbcs.dll/article?AID=/20041104/NEWS01/411040343/-1/election> (copies attached as Exhibit 5).

¹² Ohio Const. Art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

amendment barred Salt Lake City from creating a domestic partner registry.¹³ And an advocacy group, the Thomas More Law Center, sued the Ann Arbor Public Schools arguing that the Michigan amendment requires the district to discontinue providing domestic partner benefits to its employees. *See* David Eggert, Law Group Sues to Bar Public Job Same-Sex Benefits, Detroit News, April 7, 2005, available at <http://www.detnews.com/2005/careers/0505/08/D07-142463.htm> (copy attached as Exhibit 8).¹⁴

¹³ *See* Eric Resnick, Lawmaker May Try to Stop University Partner Benefits, Gay People's Chronicle, January 28, 2005, available at <http://www.gaypeopleschronicle.com/stories05/january/0128056.htm> (copy attached as Exhibit 7); Exh. 3 to initial brief of Interested Parties.

¹⁴ The Interested Parties agree with the Proponents that the language of the proposed amendment should not limit access to protection under the State's domestic violence law. But because same-sex couples can only fall within the protection of that law if recognized as "family" members (Fla. Stat. §§ 741.28, 741.30), there is a risk that if the amendment passes, some will take a different position. Indeed, newspapers report that there are already at least eight cases pending in Ohio in which defendants are challenging the application of that state's domestic violence law to unmarried partners in light of the amendment, and in two cases, the judges agreed with the defendants. *See* Eric Resnick, Courts Across Ohio Wrestle with the Ban Amendment, Gay People's Chronicle, September 30, 2005, available at <http://www.gaypeopleschronicle.com/stories05/september/0930056.htm> (copy attached as Exhibit 9); Exhibit 18 to initial brief of Interested Parties. Similarly, it was reported that a Utah man challenged a protective order requiring him to stay away from his former girlfriend, arguing that the Utah amendment made the order unconstitutional. *See* Deborah Bulkeley and Linda Thomson, Amendment Tests Loom, Deseret Morning News, November 14, 2004, available at

The experiences in other jurisdictions show that what constitutes the “substantial equivalent” of marriage varies depending upon who you ask. This kind of vague language does not fairly inform voters and thus, the proposed amendment should be stricken from the ballot.

B. “Marriage protection.”

The Proponents argue that the use of the word “protect” in the ballot summary is not improper emotional or political language because this Court has found that term acceptable in other amendments dealing with other issues.¹⁵ They seem to be suggesting that the Court can and should consider the significance of words used in ballot summaries in a vacuum, without reference to the specific context. But as the case law demonstrates, in determining whether a ballot summary uses political and emotional rhetoric that would mislead the voters, the Court takes into account the significance of the language and whether it is

<http://deseretnews.com/dn/view/0,1249,595105511,00.html> (copy attached as Exhibit 10).

¹⁵ If the Court’s ruling on a particular term used in a ballot summary dictated the acceptability of that term in all proposed amendments regardless of the context, then the term “tax relief” would be deemed inherently political and could never be included in any ballot summary. *See Advisory Op. to Att’y Gen re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004).

misleading in the particular context. For example, in *Advisory Op. to the Att’y Gen. re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667 (Fla. 2004), the Court evaluated a proposed amendment entitled “Public Protection from Repeated Medical Malpractice” which barred the issuance of medical licenses to doctors who have repeatedly been found to have committed acts of medical malpractice. The Court held that “the term ‘protection’ in the instant case does not constitute impermissible political rhetoric” because it does not constitute “subjective evaluation”; physician licensing requirements are “clearly . . . designed to protect the public.” *Id.*, at 672.

Here, in contrast, the term “protection” is political and misleading. Marriage “protection” is a “subjective evaluation” of the effect of the proposed amendment. *See Id.* It is pure “editorial comment” (*see Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984)) because it is not at all clear from the text of the proposed amendment how excluding same-sex couples from marriage and other protections would protect marriage. And the political debate over marriage and other forms of protection for lesbian and gay couples is an emotionally charged one where terminology such as “marriage protection” is selected precisely to create an emotional reaction among voters. The ballot summary substitutes the neutral

language of the amendment text with the emotional and political word “protects”. This violates the fair notice requirement.

CONCLUSION

The single-subject rule and the “clear and unambiguous” requirement are not technicalities. They ensure that when Floridians are called upon to make the critically important decision about whether to amend the constitution, they are fairly informed about what they are being asked to vote on, and that only amendments that truly have popular support are passed. The polling data shows that while a ban on marriage for same-sex couples currently has majority support, a ban on alternative forms of comprehensive protections does not. The Florida Marriage Protection Amendment employs every prohibited tactic in an attempt to secure passage of the latter despite the lack of popular support. It is classic logrolling, tacking the unpopular prohibition against alternative forms of relationship protection onto the more popular marriage ban. And the ballot summary tries to conceal the amendment’s impact beyond marriage. It uses vague language that does not fairly inform voters that other forms of relationship protection would be barred (and which ones). And it uses political “marriage

protection” rhetoric that misleads voters to believe that the amendment is just about marriage. While each of these violations alone would be reason enough to strike the proposed amendment from the ballot, their combined effect is to manipulate voters and completely corrupt the election process. The proposed amendment therefore must be stricken.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief and a copy of all Exhibits were served by overnight delivery via Federal Express on October 11, 2005, upon:

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CERTIFICATION OF TYPE STYLE AND FONT SIZE

I certify that this brief is printed in a 14 point Times New Roman font.

Leslie Cooper